89-94

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LARRY WITTERS,

Petitioner,

v.

WASHINGTON DEPARTMENT OF
SERVICES FOR THE BLIND,

Respondent.

Petition for a Writ of Certiorari
To The Supreme Court of Washington

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QUESTIONS PRESENTED

On remand from this Court, the Washington Supreme Court held that a blind ministerial student was precluded by the state constitution from participating in a vocational rehabilition program for the sole reason that his career goal was religious in nature.

1. Does the Free Exercise Clause prohibit a state from barring a medically eligible blind person from a neutral vocational rehabilitation program on the sole ground that he has a religious vocational objective?

2. Does the Equal Protection Clause prohibit a state from barring a medically eligible blind person from a neutral vocational rehabilitation program on the sole ground that he has a religious vocational objective?

3. Does the Supremacy Clause prohibit a state agency from applying a state Constitutional provision to exclude a religious individual from participating in a program which is predominantly federally funded?

PARTIES

All parties are listed in the caption.

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IN THE

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Petition for a Writ of Certiorari To The Supreme Court of Washington

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on April 20, 1989.

OPINIONS BELOW

This matter has been previously decided by this Court. 474 U.S. 481 (1986). In that decision this Court unanimously held that the First Amendment's Establishment Clause did not bar a ministerial student from participation in a neutral program of government

assistance for vocational rehabilitation. This Court remanded the case for consideration of state constitutional issues.

The opinion of the Supreme Court of the State of Washington on remand is reported at 112 Wash.2d 363, 771 P.2d 1119 (1989). It is appended to this petition beginning at 1a. This matter was not remanded by the Washington Supreme Court to any lower tribunal for the taking of additional evidence.

The prior opinion of the Supreme Court of Washington is reported at 102 Wash. 2d 625, 689 P.2d 53 (1984). The Superior Court of Spokane County, Washington, the Honorable Marcus M. Kelly, rendered its oral opinion in this matter on December 11, 1981. Findings of fact and conclusions of law were entered on May 26, 1982. Two written decisions were rendered by the Office of Hearings of the State of Washington, Department of Social and Health Services. The first was entered on October 28, 1980, and the review opinion on December 3, 1980.[1]

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[1]We have been advised by the Clerk's office of this Court that the prior proceedings should not be included in this appendix since they were included in the prior appendix when this case was previously reviewed by this Court.

JURISDICTION

This case was decided and judgment was entered by the Supreme Court of the State of Washington on April 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. Constitution, Amendment XIV:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Constitution, Article 1, Section 11:

> . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . .

Revised Code of Washington § 74.16.181:

> The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum

degree of self-support and self-care. Services provided for under this section may be furnished to clients from other agencies of this or other states for a fee which shall not be less than the actual costs of such services. Under such program the commission may:

. . .

(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, and if the same cannot be obtained within the state, provisions shall be made for such purposes outside of the state. Living maintenance during the period of such education and/or training within or without the state may be furnished.

STATEMENT OF THE CASE

Petitioner, Larry Witters, is a medically eligible blind person who continues to seek to participate in Washington State's vocational rehabilitation program for the blind. Since 1980 he has been precluded from doing so for the sole reason that his vocational objective is to become a pastor, missionary, or Christian youth director.

In 1986, this Court unanimously reversed the 1984 decision of the Washington Supreme Court which held that Witters was barred from participation in this

government program because his vocational objective was religious in nature. *Witters* v. *Washington Department of Services for the Blind,* 474 U.S. 481 (1986). The 1984 decision of the Washington Supreme Court relied upon the federal Establishment Clause holding that it was unconstitutional for Witters to participate in a neutral government vocational program because his particular vocational objective was religious in nature. This Court held that such reliance was in error. This Court focused on the vocational program as a whole and held that it met this Court's Establishment Clause test. Witters' individual participation was held to be the inappropriate frame of reference for federal constitutional analysis.

Witters also argued that this Court should hold that Washington's efforts to exclude him from the program violated his rights under the Free Exercise Clause. However, this Court refrained from deciding the Free Exercise Clause issue holding that the Washington court had not forthrightly decided that the state constitution forbade Witters' participation. This Court remanded the case back to the lower court for its consideration of those issues.

The case on remand was briefed by all sides and oral argument was heard twice, the first time on October 28, 1987, and the second on January 17, 1989.[2] The state court issued its opinion on April 20, 1989, voting five to four that the Washington State Constitution precluded Witters' participation in the vocational program.

It is agreed that Witters is statutorily eligible to participate in this program of rehabilitation for the blind. The statute itself does not exclude Witters from eligibility because of his vocational objective.

As it had done under the federal Establishment Clause, the lower court majority focused on Witters' individual participation in the neutral program to judge the constitutionality of his participation. This time the state court relied on Washington Constitution art. 1, § 11[3] holding that it was unconstitutional for

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[2]Although the court and counsel engaged in correspondence regarding the possibility of a remand for additional fact-finding, this was not pursued by the parties nor ordered by the Washington Supreme Court.

[3]This section provides: "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not

Witters to participate in the aid-for-the-blind program. The state court rejected Witters' argument that it should decide the state constitutional issues by looking at the program as a whole rather than considering barring a single individual on religious grounds. The court said:

> The applicant urges that we examine the vocational rehabilitation program as a whole and not focus on his individual participation in the program. His argument ignores the "sweeping and comprehensive" language of Const. art. 1, § 11, which prohibits not only the appropriation of public money for religious instruction, but also the application of public funds to religious instruction. Herein lies a major difference between our state constitution and the establishment clause of the first amendment to the United States Constitution. It follows that to apply federal establishment clause analysis to article 1, section 11 of the state constitution as

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be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: *Provided, however,* That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in conseqjence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

the applicant urges would be inappropriate.

771 P.2d at 1122, App. at 8a (footnote omitted).

Having decided that the state constitution forbade Witters' participation, the state court then considered his contention that his federal constitutional rights were violated by this application of the state constitution. Witters contended that his exclusion because of his religious vocational objective violates his rights to the free exercise of religion and equal protection of the law guaranteed by the First and Fourteenth Amendments, respectively.

As to the free exercise issue, the Washington court relied on its 1984 rejection of the same argument. Quoting its previous ruling in this case the court said: "[t]he challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief."[4] The court added:

> Here, the applicant is not being asked to violate any tenet of his religious beliefs, nor is he being denied benefits "because of conduct mandated by religious belief".[5] This case is

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[4]*Witters*, 102 Wash.2d at 631, 689 P.2d 53.

[5]*Thomas* v. *Review Board*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).

> dissimilar to those in which persons have been pressured by state policies to choose between benefits or rights and practicing their religion.[6]

771 P.2d at 1123, App. at 10a.

The Washington Supreme Court also rejected Witters' equal protection claim. Holding that the State of Washington had a compelling state interest in maintaining the strict separation of church and state under the state constitution, the court held that the denial of equal protection was warranted. 771 P.2d at 1123, App. at 11a-12a. The majority opinion did not discuss the concession made by the Attorney General that other students in this same program had enrolled ~~in~~ church colleges, but were enrolled for careers other than preparing for the ministry.[7] The Washington Court simply found the state

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[6]See *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); *Thomas* v. *Review Bd.*, supra; *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *McDaniel* v. *Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Sherbert* v. *Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); see also Employment Div., Or. Dep't of Human Resources* v. *Smith*, --- U.S. ----, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988).

[7]Specifically, the concession was that one other blind student was enrolled in St. Martins College, a Roman Catholic institution, pursuing a degree in accounting.

constitutional issue dispositive of the federal equal protection claim.

> To provide the specific aid requested would violate article 1, section 11 of the Constitution of the State of Washington. Denial of such aid, therefore, does not violate the equal protection clause of the Fourteenth Amendment.

771 P.2d at 1123-1124, App. at 12a.

There were three dissenting opinions filed in which a total of four justices joined. Justice Utter, joined by Justices Dolliver and Dore, wrote a scholarly analysis of the history of the Washington State Constitutional provision concluding that it was never intended to bar a religious individual from participation in a neutral government program. 771 P.2d at 1124-1132, App. at 12a-33a. He also reiterated his prior position in the 1984 decision that preclusion of Witters from the aid-to-the-blind program violated his rights under the Free Exercise Clause. 771 P.2d at 1124, App. at 13a; *Witters*, 102 Wash. 2d 624, 633, 689 P.2d 53 (1984) (Utter, J., dissenting)

Justice Utter also strongly contended that the reliance on the state constitution rather than the

of the fact that federal funds constitute 80 percent of the program's funding. Justice Utter wrote:

> Without stating its reasons or citing any authority, the majority implies that the state constitution governs the entire program, even though 80 percent of the funds derive from the federal government.
>
> The implication is erroneous. Const. art. 1, § 11 prohibits the state from appropriating "public money" for religious worship or instruction. The term "public money" refers only to those revenues raised by the state government, not those raised by the federal government.

771 P.2d at 1124-1125, App. at 14a.

Justice Dolliver's separate dissenting opinion focused on the Free Exercise Clause. He wrote:

> I do not believe the state constitution ever meant to prohibit the individual choice of an adult in such a case as this (see dissent by Utter, J.). But even assuming the majority interpretation of the meaning of "religious instruction" is correct, it cannot supersede the free exercise clause. See *Reynolds* v. *Sims*, 377 U.S. 533, 584, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964).

Witters chooses to carry out his religious beliefs

> by studying theology and becoming a minister. He became eligible for aid because of a physical handicap and is still eligible for that reason. Witters does not ask for an exception to the general rule of eligibility. He only asks the general rule to be applied with equality, not for his choice of training to be disqualified because of its religious content.
>
> While it is clear that the majority believes there is no infringement of Witters' free exercise right, it neither offers any reasoning for such a conclusion based on the facts in this case, nor does it distinguish the federal cases which reach the exactly opposite conclusion.

771 P.2d at 1133, App. at 34a-35a.

Justice Dolliver undertook a case-by-case analysis of this Court's decisions in *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Widmar* v. *Vincent*, 454 U.S. 263 (1982); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Justive Dolliver found *Widmar* particularly pertinent since Missouri had attempted to justify its denial of First Amendment rights by reliance on a state constitutional provision which demanded stricter separation of church and state than provided in the

Establishment Clause. He wrote:

> Just as in *Widmar*, creating greater separation of church and state under our constitution than is required by the establishment clause of the federal constitution may be a rational reason, but it is not a compelling reason for the state when it comes in direct conflict with the free exercise clause of the First Amendment. Accord, *McDaniel* v. *Paty*, 435 U.S. 618, 55 L. Ed. 2d 593, 98 S. Ct. 1322 (1978).
>
> In an age of government benefits, balancing separation of church and state and freedom of religion is complex and cannot be done by placing our state establishment clause above the federal free exercise clause.

771 P.2d at 1135, App. at 39a.

Justice Durham wrote a separate dissent to note her concurrence in certain portions of Justice Utter's discussion of the state constitutional issues, believing it unnecessary to reach other portions of the state issues. 771 P.2d at 1136-1137, App. at 42a-43a.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE PRINCIPLES ESTABLISHED BY THIS COURT

This case presents significant tension between the principles of separation of church and state and the principle of the free exercise of religion. This Court has rightly recognized that cases which require reconciliation of these competing principles are among the most important to the protection of our religious liberty.

In 1986 this Court resolved an important facet of this conflict when this Court unanimously ruled that the First Amendment's Establishment Clause did not require the preclusion of a blind ministerial student from a neutral government vocational training program. This Court focused on the program as a whole in judging its constitutionality under the federal Constitution.[8]

On remand, despite petitioner's plea to follow the

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[8]*Witters* v. *Washington Dep't of Services for the Blind*, 474, U.S. 481, 487-488 (1986).

same program-as-a-whole analysis under the state constitution, and despite the cogent dissenting opinions joined by four justices, the state court majority once again focused on the constitutionality of Witters' personal participation "as if the Washington Legislature had passed a private bill that awarded petitioner free tuition to pursue religious studies." *Witters, supra*, 474 U.S., at 492 [Powell, J., concurring.] The state court relied on article 1, § 11 of the Washington State Constitution to conclude that the state constitution demanded a "stricter" separation of church and state than commanded under the First Amendment.

That court is, of course, the final arbiter of the meaning of its state constitution. However, since this case began in 1980 Witters has claimed that if the Washington Constitution is interpreted to preclude his participation in the government program then, as applied, the state constitutional provision is invalid under the federal Free Exercise and Equal Protection Clauses.

Previous attempts of state governments to deny their citizens federal constitutional rights in order to enforce a "stricter" regime of separation of church and

state have met with little success in this Court. In *Widmar* v. *Vincent*, 454 U.S. 263 (1982), this Court rejected Missouri's attempt to banish religious speech from state college campuses in pursuit of a state constitutional provision which demanded stricter separation. In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), this Court rejected Tennessee's state constitutional provision which barred ministers from holding elective office as violating the Free Exercise Clause.

Witters' situation is indistinguishable from those facing the students in *Widmar* and the minister in *McDaniel.* In each of these cases a religious person was being singled out by state government for disparate treatment because of their religious actions or status.

As noted by Justice Dolliver, dissenting below: "Witters does not ask for an exception to the general rule of eligibility. He only asks the general rule to be applied with equality, not for his choice of training to be disqualified because of its religious content." 771 P.2d at 1133, App. at 35a.

This Court has correctly treated the principles of non-establishment and free exercise as equally important to our religious liberty. State constitutions

which permit, or perhaps require, state government to single out religious individuals for disparate treatment clearly violate the federal Free Exercise Clause. It is of considerable importance to our constitutional system to refuse to countenance such disparate treatment of religious individuals even when done in the name of a state constitution.

In the government-benefits line of cases, this Court has uniformly held that state governments cannot deny benefits to a person who acts in accordance with sincerely held religious beliefs. *Frazee* v. *Illinois Dep't of Employment Security*, __U.S.__, 103 L.Ed.2d 914, 109 S.Ct. 1514 (1989); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Like *Frazee, Hobbie, Thomas,* and *Sherbert* there is here a denial of government benefits to a religious person who has been acting in accordance with sincerely held religious beliefs. The claim of the lower court majority that these cases are distinguishable is devoid of merit. Their argument that Witters' religious beliefs have not been unconstitutionally "burdened" by the denial of benefits

was answered by this Court in *Sherbert:*

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

374 U.S., at 404.

A brief review of this Court's applicable decisions makes it clear that although petitioner's position is clearly in line with this Court's rulings, the facts presented represent an important new application of these principles.

In *Mueller* v. *Allen,* 463 U.S. 388 (1983), and in *Witters,* this Court has made it clear that the Establishment Clause does not forbid the participation of religious students in neutral programs of educational funding. And in *Frazee, Hobbie, Thomas,* and *Sherbert,* this Court has made it clear that disparate exclusion of an individual on religious grounds from a program of government benefits violates the Free Exercise Clause. And in *McDaniel* and *Widmar* this Court held that state constitutional provisions requiring "stricter" separation of church and state do not justify the denial of the First Amendment rights of free exercise of religion and free speech.

In its current posture this case represents a synthesis of all three of these important lines of religion cases. Yet, this case presents an important new twist to these familiar themes. Unlike *Frazee*, *Hobbie*, *Thomas*, and *Sherbert*, this case involves government educational benefits not unemployment benefits. It is critical for this Court to once again grant review in this case to ensure that the prohibition against disparate treatment of religious individuals is not limited to unemployment cases. If the decision of the Supreme Court of Washington is permitted to stand, it may well be read by other courts to signal a willingness ~~of~~ this Court to permit disparate treatment of religious individuals in the sector of education in general or vocational training in particular. This is especially true in light of the fact that this Court has once reviewed this case. A denial of certiorari under these circumstances will elevate the Washington Supreme Court's bare majority opinion to unwarranted precedential value.

Moreover, it may even be read by some courts to represent a retreat from this Court's 1986 unanimous holding in this case. While the state court is entitled to interpret its state constitution, its disregard of this

Court's program-as-a-whole analysis appears to represent a dogged determination to stick to its prior ruling regardless of the views of this Court.

Perhaps the clearest language which should govern this case is found in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). In *Everson* this Court considered an Establishment Clause challenge to a New Jersey program which allowed students of all schools -- public and private, religious and secular -- to ride public school bus transportation to and from school. In the course of discussing the Establishment Clause issues, this Court talked of the balance created by the Free Exercise Clause.

> New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faiths of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.

330 U.S., at 16.

Washington State has done what New Jersey was forbidden to do. It has excluded Larry Witters as an individual from receiving the benefits of public welfare legislation because of his faith. This denial of the rights of free exercise of religion and equal protection of the laws cannot be countenanced.

If the Washington Supreme Court had added a single paragraph to its 1984 opinion that in addition to the federal Establishment Clause, its holding was also predicated on the state constitution, the questions we urge today would have been answered by this Court in 1986. The importance of this case has not waned. Review for a second time is warranted.

II

THIS CASE PRESENTS IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW NOT PREVIOUSLY RESOLVED BY THIS COURT

In addition to the free exercise and equal protection issues previously discussed, there is an additional question of federalism presented in this case. The stipulated facts of this case are that 80 percent of the funding for the program in question is

federal and 20 percent is state funds. The Washington Supreme Court has applied its state constitutional limitations regarding the use of "public funds" to bar Witters from receiving both state and federal assistance. This is a case of the tail wagging the dog in both the constitutional and financial arenas.

Justice Utter, dissenting below, said:

> The majority fails to address Mr. Witters' argument that the term "public money" as used in Const. art. 1, sec. 11 refers only to the portion of this vocational rehabilitation program involving state funds. Without stating its reasons or citing any authority, the majority implies that the state constitution governs the entire program, even though 80 percent of the funds derive from the federal government.
>
> The implication is erroneous. Const. art. 1, sec. 11 prohibits the state from appropriating "public money" for religious worship or instruction. The term "public money" refers only to those revenues raised by the state government, not those raised by the federal government. The definition of "public money" as that term is used in Const. art. 1, 11 is well settled. As this court stated in *Washington Health Care Facilities Auth.* v. *Spellman*, 96 Wash.2d 68, 73, 633 P.2d 866 (1981):
>
> > The reasonable meaning of "public money" in article 1, section 11 is money from the

> treasury of this state or its municipalities, not some other governmental exchequer.
>
> The constitutional constraints apply only to those funds appropriated by the state; in this case, money from the state treasury represents only 20 percent of the program.
>
> The state constitution does not prohibit a state agency from disbursing federal funds to Mr. Witters. Therefore, at a minimum, Mr. Witters is entitled to vocational rehabilitation funding in proportion to the federal funds involved in this program.

771 P.2d. at 1124-25, App. at 14a-15a.

Thus, the exclusion of Witters from the program for the blind by virtue of this state constitutional provision is doubly suspect. Not only is he denied the free exercise of religion and equal protection, but the will of Congress has been thwarted by a state agency interpreting a state constitutional provision. Neither Congress nor the Washington Legislature enacted any legislative exclusion for Witters to receive aid intended for all blind persons. But it is the federal legislative will which has been primarily thwarted because Congress has contributed the lion's share of the funding.

Even if this were a case where the state legislature had decided that it would decline to permit religious individuals from participating in the vocational program, its ability to do so in light of its relatively token financial contribution would be constitutionally suspect. Under these facts the error is even more glaring. A state agency (buttressed by a state court decision) has affirmatively employed a state constitutional provision to deny a blind man access to federal funds because of his religion.

Although this is a novel question, it is clearly impermissible for the state agency to violate the Supremacy Clause of the United States Constitution in this manner.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Washington Supreme Court.

July 19, 1989

Respectfully submitted,

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CERTIFICATE OF SERVICE

Michael P. Farris, counsel of record for petitioners and a member of the bar of this Court certifies that on this day he mailed by first class mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondents as follows:

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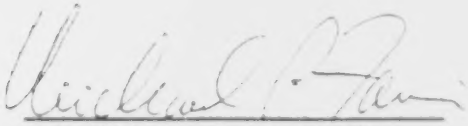
July 19, 1989



MICHAEL P. FARRIS

APPENDIX

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LARRY WITTERS,	)	
	)	No. 49673-1
Appellant,	)	
	)	En Banc
v.	)	
	)	
STATE OF WASHINGTON COMMISSION FOR THE BLIND,	)	
	)	
Respondent.	)	Filed
	)	April 20, 1989
	)	

ANDERSEN, Justice.

FACTS OF CASE

In this case we consider for the second time whether error was committed when a visually handicapped student was denied state financial assistance to enable him to attend a private bible college with the goal of becoming a pastor, missionary or church youth director. We hold that when a person "is getting a religious education" (italics ours), to use the words of his attorney, that person comes squarely within the express prohibition contained in the Constitution of the State of Washington that "[n]o public money ... shall be appropriated for or applied to any religious ... instruction". (Italics ours.) Const. art. [1120] 1, 11 (part). Accordingly, the Washington

State Commission for the Blind and the Superior Court for Spokane County did not err when they denied state financial assistance for his education. Phrasing it a bit differently, our state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree.

Appellant Larry Witters, who will be referred to herein as the "applicant", applied for vocational rehabilitation funds from the Washington State Commission for the Blind (Commission) in 1979.[1] He planned to use the funds to pursue a course of study that would prepare him for a career as a pastor, missionary or youth director. At the time of his request, the applicant was enrolled at the Inland Empire School of the Bible in Spokane pursuing a 3-year Bible diploma. Later, he switched to a 4-year program that would earn him a biblical studies degree from Inland Empire School of the Bible and a bachelor of arts degree from Whitworth College. His curriculum included Old and New Testament studies, ethics, speech and church administration.

The applicant qualifies as a legally blind person under the physical and medical eligibility requirements specified in RCW 74.16.[2] Funding for the Commission's assistance program is provided by both federal (80 percent) and state (20 percent) moneys. The Commission denied the applicant's request on the

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[1]The Washington State Commission for the Blind is now the Department of Services for the Blind. See RCW 74.18 which in 1983 replaced former RCW 74.16 and 74.17. Laws of 1983, ch. 194, Sec. 3, p. 1050.

[2]Repealed, Laws of 1983, ch. 194, Sec. 30, p. 1057.

basis of its policy statement, which states: "Private institutions or out-of-state institutions: The Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." After an unsuccessful internal administrative review, the applicant appealed the action to the Superior Court for Spokane County under the state administrative procedure act.[3] On May 26, 1982, following a hearing, the trial court entered findings of fact and conclusions of law affirming the Commission's order, also on state constitutional grounds.

In 1984, this court affirmed the decision of the Commission and the Superior Court holding that "the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution." Witters v. Commission for the Blind, 102 Wash.2d 624, 626, 689 P.2d 53 (1984), rev'd sub nom. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986). This court did not reach the state constitutional grounds on which both the Commission and the Superior Court had relied. Instead, it based its decision on the United States Supreme Court's 3-part test for determining the constitutionality of state aid under the establishment clause of the first amendment to the United States Constitution:

First, the statute must have a secular legislative

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[3]RCW 34.04; see also former RCW 74.16.530(1).

> purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), quoted in Witters, 102 Wash.2d at 628, 689 P.2d 53. After concluding that the first criterion was met, this court held that the second criterion, primary effect, was not.[4] The court declined to address entanglement, [1121] the third Lemon criterion.[5] Finally, this court rejected the applicant's free exercise clause argument and declined to address his equal protection clause argument. [6]

In 1986, the United States Supreme Court reversed this court's 1984 decision. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986). It rejected this court's analysis of the second Lemon criterion and remanded the case to us for further proceedings. Pursuant to that remand, we now address three principal issues.

ISSUES

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[4]Witters v. Commission for the Blind, 102 Wash.2d 624, 629, 689 P.2d 53 (1984), rev'd sub nom. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986).

[5]Witters, 102 Wash.2d at 630, 689 P.2d 53.

[6]Witters, 102 Wash.2d at 631-32, 689 P.2d 53.

ISSUE ONE. Does the Constitution of the State of Washington prohibit the Commission from granting vocational rehabilitation funds to a visually handicapped applicant to use at a religious institution for a course of study designed to prepare him for a career as a pastor, missionary or youth director?

ISSUE TWO. If the Constitution of the State of Washington is a bar to the applicant's request for educational assistance, is such denial of funds a violation of the free exercise clause of the First Amendment?

ISSUE THREE. If the Constitution of the State of Washington is a bar to the applicant's request, is the denial of funds to the applicant a violation of the Fourteenth Amendment equal protection clause?

DECISION

ISSUE ONE.

CONCLUSION. The Commission and the Superior Court did not err in denying state financial assistance for the applicant to use for religious instruction; the Constitution of the State of Washington, article 1, section 11, prohibits this.

As the United States Supreme Court observed in its opinion in this case, "[t]he Establishment Clause of the First Amendment has consistently presented this Court with difficult questions of interpretation and application."[7] Then, after concluding that there was no violation of that clause of the federal constitution, and that the case should be remanded,

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[7]Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 485, 106 S.Ct. 748, 751, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986).

the United States Supreme Court also held that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution, see Witters v. Commission for the Blind, 102 Wash.2d, at 626, 689 P.2d, at 55."[8]

Article 1, section 11 of the Constitution of the State of Washington provides in pertinent part:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...

(Italics ours.) Here, the applicant is asking the State to pay for a religious course of study at a religious school, with a religious career as his goal. This falls precisely within the clear language of the state constitutional prohibition against applying public moneys to any religious instruction. Indeed, as counsel for the applicant summarized at oral argument before this court:

> We would concede that Larry Witters is getting a religious education.

(Italics ours.) Our state constitution prohibits the use of public moneys to pay for such religious instruction.

This court has twice construed the term "religious instruction".

In State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918), the court struck down a school board resolution giving high school credits for Bible

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[8]Witters, 474 U.S. at 489, 106 S.Ct. at 753.

study done outside of school, even though the course [1122] of study covered only the "historical, biographical, narrative and literary features of the Bible".[9]

On the other hand, the court upheld the teaching of "English 390: The Bible as Literature" at the University of Washington in Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash.2d 912, 436 P.2d 189 (1967), cert. denied, 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968). In Calvary, the court interpreted "religious instruction" as used in article 1, section 11 to mean "instruction that is devotional in nature and designed to induce faith and belief in the student."[10] The court went on to say:

> There can be no doubt that our constitutional bars are absolute against religious instruction and indoctrination in specific religious beliefs or dogma; but they do not proscribe open, free, critical, and scholarly examination of the literature, experiences, and knowledge of mankind.

Calvary, at 919, 436 P.2d 189.

In this case, Inland Empire School of the Bible is a Christian college. The applicant's course of study is designed to prepare him for a career promoting Christianity. His Bible study and church courses necessarily provide indoctrination in the specific beliefs of Christianity. Thus, for the Commission to provide vocational assistance funds to the applicant as

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[9]State ex rel. Dearle v. Frazier, 102 Wash. 369, 373, 173 P. 35 (1918).

[10]Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash.2d 912, 919, 436 P.2d 189 (1967), cert. denied, 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968).

he requests would violate article 1, section 11 of the Constitution of the State of Washington because public money would be applied to religious instruction.

The applicant urges that we examine the vocational rehabilitation program as a whole and not focus on his individual participation in the program. His argument ignores the "sweeping and comprehensive"[11] language of Const. art. 1, sec. 11, which prohibits not only the appropriation of public money for religious instruction, but also the application of public funds to religious instruction. Herein lies a major difference between our state constitution and the establishment clause of the first amendment to the United States Constitution. It follows that to apply federal establishment clause analysis to article 1, section 11 of the state constitution as the applicant urges would be inappropriate.

Having concluded, as we do, that article 1, section 11 of our state constitution is dispositive of the issue of whether the Constitution of the State of Washington prohibits the funding of the applicant's vocational rehabilitation plan, we need not consider the parameters of article 9, section 4 of the state constitution.[12]

ISSUE TWO.

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[11] Dearle, 102 Wash. at 375, 173 P. 35. See also Garnett v. Renton Sch. Dist. 403, 675 F.Supp. 1268, 1275 (W.D.Wash.1987); Perry v. School Dist. 81, 54 Wash.2d 886, 344 P.2d 1036 (1959).

[12] "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Const. art. 9, sec. 4.

CONCLUSION. Neither the applicant's freedom to believe nor his freedom to act in a manner consistent with his beliefs is being encroached by the article 1, section 11 ban on expenditure of state funds for religious instruction. The applicant's right to free exercise of religion has not been violated.

This court has already held that denial of aid to the applicant herein did not violate the applicant's right to the free exercise of religion.[13] The fact that we now base denial of the funds on article 1, section 11 of our state constitution instead of the establishment clause of the first amendment to the United States Constitution does not affect this court's earlier analysis and conclusions on the free exercise of religion issue.

A state action is constitutional under the free exercise clause if the action results in no infringement of a citizen's constitutional [1123] right of free exercise or if any burden on free exercise of religion is justified by a compelling state interest.[14] To prevail in a free exercise case, the complaining party must show "the coercive effect of the enactment as it operates against him in the practice of his religion."[15] As this court held, "[t]he challenged state action must somehow compel or pressure the individual to violate a tenet of his religious belief."[16]

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[13]Witters, 102 Wash.2d at 631, 689 P.2d 53.

[14]Sherbert v. Verner, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963).

[15]School Dist. v. Schempp, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963).

[16]Witters, 102 Wash.2d at 631, 689 P.2d 53.

Here, the applicant is not being asked to violate any tenet of his religious beliefs, nor is he being denied benefits "because of conduct mandated by religious belief".[17] This case is dissimilar to those in which persons have been pressured by state policies to choose between benefits or rights and practicing their religion.[18]

As this court already held when this case was before it earlier,

> In the present case, the Commission's denial of vocational aid to the [applicant] did not compel or pressure him to violate his religious beliefs. [Applicant] chose to become a minister, and the Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [applicant] to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.

Witters, 102 Wash.2d at 631, 689 P.2d 53. As Justice

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[17]Thomas v. Review Bd., 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981).

[18]See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987); Thomas v. Review Bd., supra; Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); see also Employment Div., Or. Dep't of Human Resources v. Smith, --- U.S. ----, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988).

Douglas also aptly expressed it in Sherbert v. Verner, 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963):

> The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.[19]

For the foregoing reasons, the Commission's denial of funds to the applicant does not violate the free exercise clause of the United States Constitution.

ISSUE THREE.

CONCLUSION. Denial of vocational assistance funds to the applicant herein is not a violation of the equal protection clause of the Fourteenth Amendment.

The classification here at issue is the Commission's policy of denying vocational funding of any student's religious studies. This classification is directly related to the state's interest in ensuring the separation of church and state, as required by the Constitution of the State of Washington. The state has a compelling interest in maintaining the strict separation of church and state set forth in Const. art. 1, sec. 11.[20] The

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[19]Quoted in part in Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).

[20]Garnett, 675 F.Supp. at 1276-77.

applicant's individual interest in receiving a religious education must therefore give way to the state's greater need to uphold its constitution.

We again uphold the Commission's decision, and that of the Superior Court, to deny applicant's request for vocational assistance in funding his religious instruction. To provide the specific aid requested would violate article 1, section 11 of the Constitution of the State of Washington. Denial of such aid, therefore, does not violate [1124] the equal protection clause of the Fourteenth Amendment.[21]

In any event, the denial of tuition for religious instruction is but a refusal of state funds to advance religion in a constitutionally impermissible way; the Commission has not discriminated against the applicant because he is religious, but has refused to use state moneys to pay for his religious activities.

Affirmed.

CALLOW, C.J., and BRACHTENBACH, PEARSON and SMITH, JJ., concur.

UTTER, Justice (dissenting).

The majority's analysis of Const. art. 1, sec. 11 is contrary to the meaning and purpose of this provision in our state constitution. The decision by the Washington State Commission for the Blind to exclude Mr. Witters from the vocational rehabilitation program is not required by the language in our constitution, our previous holdings, or the evidence in this case. It also jeopardizes public funding for students who study nonreligious courses at religious institutions. Additionally, as Justice Dolliver states in

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[21] See Garnett, 675 F.Supp. at 1277.

his dissenting opinion, and as I have previously stated in Witters v. Commission for the Blind, 102 Wash.2d 624, 633, 689 P.2d 53 (1984) (Utter, J., dissenting), rev'd sub nom. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986), the State's attempt to condition the receipt of vocational rehabilitation assistance on the absence of a "religious" career goal unconstitutionally abridges the recipient's right under the United States Constitution to freely exercise his faith. For these reasons, I dissent.

The majority holds that an individual who meets all of the state and federal legislative criteria for participating in the vocational rehabilitation program for the blind must be excluded entirely from the program because some of his vocational training may involve "religious" instruction. Yet the State has completely failed to show that Mr. Witters' vocational training constitutes such instruction or that public funding in his case is forbidden.

The majority suggests that this harsh result is mandated by the establishment clause of our state constitution, Const. art. 1, sec. 11. In reaching its conclusion, the majority fails to follow the interpretive guidelines for state constitutional analysis this court has only recently developed. State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986); State v. Reece, 110 Wash.2d 766, 757 P.2d 947 (1988). Consequently, it reaches a result that I cannot support.

Const. art. 1, sec. 11 states: (1) no "public money" (2) shall be "appropriated ... or applied" by the state (3) to "religious ... instruction". A careful examination of these three clauses reveals three major defects in the majority opinion. First, "public money" refers only to those funds emanating from the state treasury;

since state money contributes only 20 percent of the funding for this vocational rehabilitation program, the state constitution affects only that portion. Second, application of these funds for instruction at a religious institution is the result of a personal decision by the individual recipient, not the state; therefore, the state would not be "appropriating or applying" the funds. Third, this court has previously defined "religious instruction" to be that instruction which is devotional in nature and is intended to induce faith in the pupil. There is no evidence in the record to support the majority's conclusion that all or any of Mr. Witters' training will involve such instruction.

I

The majority fails to address Mr. Witters' argument that the term "public money" as used in Const. art. 1, sec. 11 refers only to the portion of this vocational rehabilitation program involving state funds. Without stating its reasons or citing any authority, the majority implies that the [1125] state constitution governs the entire program, even though 80 percent of the funds derive from the federal government.

The implication is erroneous. Const. art. 1, sec. 11 prohibits the state from appropriating "public money" for religious worship or instruction. The term 'public money' refers only to those revenues raised by the state government, not those raised by the federal government. The definition of "public money" as that term is used in Const. art. 1, 11 is well settled. As this court stated in Washington Health Care Facilities Auth. v. Spellman, 96 Wash.2d 68, 73, 633 P.2d 866 (1981):

> The reasonable meaning of "public money" in article 1, section 11 is money from the treasury

> of this state or its municipalities, not some other governmental exchequer.

The constitutional constraints apply only to those funds appropriated by the state; in this case, money from the state treasury represents only 20 percent of the program.

The state constitution does not prohibit a state agency from disbursing federal funds to Mr. Witters. Therefore, at a minimum, Mr. Witters is entitled to vocational rehabilitation funding in proportion to the federal funds involved in this program.

II

Const. art. 1, sec. 11 prohibits the state from "appropriating or applying" public money for religious instruction. In granting Mr. Witters money for his vocational training, the state is neither appropriating nor applying funds for religious instruction. The state is merely appropriating public funds for a neutral vocational rehabilitation program designed to assist the visually handicapped in developing skills necessary for employment. The decision to apply those funds for instruction at a religious or secular school is made by the individual aid recipient, not the state. As the United States Supreme Court unanimously observed:

> Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients....

Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 487, 106 S.Ct. 748, 752, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89

L.Ed.2d 737 (1986).

The state's program of vocational rehabilitation for the blind is in stark contrast to other state funded programs which have fallen afoul of Const. art. 1, sec. 11. In State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918), the court struck down a program giving high school students credits for bible study outside the school. As that court stated, "the vice of the present plan is that school credit is to be given for instruction at the hands of sectarian agents." Dearle, at 378, 173 P. 35. Similarly, this court struck down funding programs in which the primary beneficiaries were students at parochial or religious schools. Weiss v. Bruno, 82 Wash.2d 199, 509 P.2d 973 (1973); State Higher Educ. Assistance Auth. v. Graham, 84 Wash.2d 813, 529 P.2d 1051 (1974).

The constitutional infirmity of those cases is not present here. The vocational rehabilitation program for the blind is not structured to confer public benefits to students at religious or parochial schools; no evidence has been presented indicating that any other student pursuing a religiously oriented career has applied for these funds. Therefore, to the extent that students at parochial or religious schools benefit at all, it is incidental to the primary purpose and effect of the program.

The majority suggests that in order to determine whether the application of public funds violates Const. art. 1, sec. 11 we must examine how the individual recipient of such funds chooses to apply the money. The majority provides no precedent for such a microscopic examination of the use of public assistance funds. Such an approach lacks any support in our case law and will have serious unintended consequences. If the use of vocational rehabilitation funds can be so constrained by government regulators,

the same logic would allow the state government to impose conditions on the expenditure of other public funds by individual recipients. [1126]

It is far more reasonable and consistent to confine our analysis to the nature of the public assistance program itself. If the program itself does not violate the constitution, then our inquiry should end. The purpose of the constitutional prohibition against appropriating or applying public funds for religious instruction is to constrain state government actions not individual decisions. Since the only state action involved here is appropriating funds for a neutral vocational rehabilitation program, there is no violation of Const. art. 1, sec. 11. For the same reasons that the State does not now attempt to prevent a salaried public official or recipient of unemployment compensation from giving their public money for "religious worship, exercise or instruction", the state should not be allowed to control the career choices of a recipient of vocational rehabilitation funds.

III

In affirming the Commission's decision to reject Mr. Witters' application for funds, the majority relies on an alternative theory to the one used by the Commission. The Commission denied vocational rehabilitation funds to Witters because it concluded that the state constitution "forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." The Commission excluded Mr. Witters from this program because his vocational objective was to become a pastor, missionary or youth director. This court also focused on Mr. Witters' career goals when it ruled that the provision of state aid to him would violate the federal establishment clause. Witters v.

Commission for the Blind, 102 Wash.2d 624, 626, 689 P.2d 53 (1984), rev'd, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986).

Without addressing the issue, the majority implicitly rejects the religious career rationale as did the State upon reargument before this court. This is just as well. The state constitution does not prohibit application of public funds for vocational training of an individual preparing for a religious career. Const. art. 1, sec. 11 is very specific; it restricts public funding of religious instruction, not instruction for individuals pursuing religiously oriented careers. To this extent, the court is reversing that portion of the Commission's policy that discriminates against those applicants pursuing religiously oriented careers.

Although the majority rightfully abandons the religious career rationale, it asserts a new rationale which was not presented to the trial court that is equally indefensible. The majority now says that Mr. Witters must be excluded from the rehabilitation program not because of his vocational objectives per se but because his vocational training may involve some "religious instruction". This conclusion is not supported by the record. The State has introduced no evidence describing the nature of the instruction Mr. Witters is receiving.

There is only one case in Washington law that defines "religious instruction" as that phrase is used in Const. art. 1, sec. 11. In Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash.2d 912, 436 P.2d 189 (1967), cert. denied, 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968), this court stated that

> the framers of our constitution did not intend the word "instruction" to be construed without limit, but that the proscribed field be confined to that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct, i.e., instruction that is devotional in nature and designed to induce faith and belief in the student.

(Italics mine.) Calvary, at 919, 436 P.2d 189.

The Calvary court demonstrated that the only way to determine whether any instruction is "religious" within the meaning of Const. art. 1, sec. 11 is to examine the instruction itself and see whether it is objective or devotional in manner. Calvary, at 920-21, 436 P.2d 189. Finding that the teaching of "English 390: The Bible as Literature" at the University of Washington [1127] was not designed to induce faith and belief in the student, the court held that this course was not "religious instruction"; therefore, public funding of it did not violate Const. art. 1, sec. 11. Calvary, at 921, 436 P.2d 189.

Mr. Witters' curriculum includes courses in Old and New Testament, ethics, speech, and church administration. Aside from this general information, we know little about the vocational training Mr. Witters is receiving. The State has produced no evidence regarding the manner of instruction. The parties stipulated only that the "classwork consists of classes instructional in nature for which he pays tuition. There are also devotional chapel services at the school for which he pays nothing." Petitioner's Proposed Factual Stipulation, Aug. 11, 1980 (signed by counsel for both parties). The parties also stipulated that the college Mr. Witters wished to

attend was not a denominational or sectarian institution. Verbatim Report of Proceedings, at 6.

Given the absence of any evidence regarding Mr. Witters' other courses and the manner of instruction, the majority's conclusion that his program of study amounts to "religious instruction" rests on no more than speculation. The majority hypothesizes that because Mr. Witters is attending a Christian college and intends to pursue a religious career, his courses "necessarily provide indoctrination in the specific beliefs of Christianity." Majority, at 1122. This is mere guesswork and is hardly a sufficient basis for a constitutional ruling. If all instruction of a nondevotional nature at a Christian college is "religious instruction", then we have radically expanded, without reason, the barriers of our constitution.

The vocational objective of pastor, missionary or youth director does not imply that an individual would take only those courses offering "religious instruction". Even if Mr. Witters attended courses on the Bible and church administration, our decision in Calvary recognizes that instruction in these subjects can be objective and nondevotional.

Aside from the absence of any factual basis to support a finding that any of Mr. Witters' course work involves "religious instruction", the majority attempts to prove too much in suggesting that all of Mr. Witters' training would involve such instruction. Even the State concedes that not all courses at the Inland Empire School of the Bible are necessarily religious in nature. The State further concedes that use of public funds for tuition to cover nonreligious courses at private religious institutions would not violate Const. art. 1, sec. 11. Brief of Appellant (on remand from the United States Supreme Court), at 21-24.

This court should do no less.

The majority's holding will have dramatic effect on other public assistance programs that indirectly benefit students at private schools. By refusing to allow vocational rehabilitation funds to cover any portion of Mr. Witters' course work, the majority jeopardizes the public funding relied upon by countless other students in this state who study nonreligious courses but are attending religious or parochial schools. By failing to demand the State sustain its burden to prove the courses taken by Witters are devotional in nature and designed to induce faith and belief in the student, the majority calls into doubt the clear holding in Calvary Bible Presbyterian Church v. Board of Regents, supra. It creates a needless barrier not required by the language, spirit, or history of our state constitution. The state has constitutional authority to exclude Mr. Witters from the vocational rehabilitation program only for that portion of his training which involves "religious instruction". The State has failed to show that any of Mr. Witters' vocational training involves "religious instruction". Because the evidence does not indicate that any of Mr. Witters' vocational training will include "religious instruction", he is entitled to the full amount of state and federal benefits under the program.

IV

Many of the pitfalls in the majority's analysis could be avoided if this court [1128] adopted a more systematic approach to interpreting Const. art. 1, sec. 11. A meaningful analysis must begin with application of the guidelines this court has articulated to facilitate constitutional decisionmaking.

In Gunwall, this court announced several nonexclusive neutral guidelines to assist courts in

deciding whether to interpret state constitutional provisions differently than the United States Supreme Court's interpretation of analogous provisions of the United States Constitution. State v. Gunwall, 106 Wash.2d at 56-61, 720 P.2d 808. These guidelines were articulated to facilitate state constitutional analysis and prevent result-oriented jurisprudence. Writing for a unanimous court, Justice Andersen stated that the purpose of the Gunwall criteria is

> to insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of ... the United States Supreme Court.... Recourse to our state constitution as an independent source ... must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.

Gunwall, at 62-63, 720 P.2d 808.

The court listed six nonexclusive criteria: (1) textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, at 61-62, 720 P.2d 808. Although the Gunwall criteria create no presumption for the federal analysis of analogous provisions of the United States Constitution, they do serve as useful interpretive aids when state courts must decide whether to interpret

analogous state constitutional provisions differently. Reece, 110 Wash.2d at 778, 757 P.2d 947.

Inexplicably, the majority discusses none of the Gunwall criteria. Thus, we have no principled analysis to explain why this court chooses to interpret the state establishment clause to prohibit that which a unanimous United States Supreme Court has expressly approved under the establishment clause of the federal constitution. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986). Without such analysis, the resort to independent state grounds to reach a different result in this case appears to spring from the "pure intuition" that this court rightly scorned in Gunwall.

A close examination of the Gunwall criteria demonstrates why application of the state constitution in this instance should not lead to a different result than that reached by the United States Supreme Court.

A. LANGUAGE

The first two criteria of Gunwall direct the court to consider the language of the state constitution and the parallel provision of the federal constitution. There is no question that the language of the federal and state establishment clauses is different. The First Amendment provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...

Const. art. 1, sec. 11 provides:

> No public money or property shall be

> appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...

While the language of the state constitution appears to be more specific in prohibiting the state from appropriating funds for religious instruction, it is not necessarily any more or less restrictive in application to specific fact situations than the federal establishment clause.

The majority suggests a different result than that reached by the United States [1129] Supreme Court is mandated by the "far stricter" language of the state constitution. This characterization of the Washington establishment clause does not by itself support the conclusion that the state constitution must differ from the federal constitution on this particular issue. The doctrinaire rigidity with which the majority attempts to interpret Const. art. 1, 11 is not justified by the document's purpose and history and has received well-deserved criticism in the scholarly literature. See Conklin & Vache, The Establishment Clause and the Free Exercise Clause of the Washington Constitution--A Proposal to the Supreme Court, 8 U. Puget Sound L.Rev. 411 (1985) (suggesting that the rigid ideological interpretation of Const. art. 1, sec. 11 reflected in some of this court's previous opinions owes more to anti-Mormon and anti-Catholic sentiment in the late 19th century than to any careful examination of its terms).

In certain cases where language differences have compelled it, this court has interpreted the state establishment clauses more strictly than federal courts interpreting the federal establishment clause. See State ex rel. Dearle v. Frazier, supra; State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000

(1930); Visser v. Nooksack Valley School Dist. 506, 33 Wash.2d 699, 207 P.2d 198 (1949). However, this court has also adopted the approach of the United States Supreme Court when that court has considered an identical issue under the federal establishment clause. Thus, in Perry v. School Dist. 81, 54 Wash.2d 886, 344 P.2d 1036 (1959), this court followed the approach of the United States Supreme Court in holding that a "release time" program allowing students in the public schools to be released for 1 hour per week to receive religious education did not violate Const. art. 1, sec. 11 so long as neither class time nor school facilities were used to promote the program. Perry, at 895-96, 344 P.2d 1036 (following Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948) and Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952)). Differences in language between the state and federal establishment clauses do not support a different result in every case. The majority does not present a reasonable argument that such differences compel a contrary result in this case.

The state constitution is an expression of the people's will and depends for its validity on their ratification. See State ex rel. Albright v. Spokane, 64 Wash.2d 767, 770, 394 P.2d 231 (1964). The words used must be given their common ordinary meaning at the time the particular provision was adopted. State ex rel. O'Connell v. Slavin, 75 Wash.2d 554, 557, 452 P.2d 943 (1969). The "common and ordinary meaning" is the meaning the words had to the vast majority of ordinary voters. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L.Rev. 491, 510 (1984). As the Wisconsin court stated, the words must be

construed in the context of the "general run of voters to whom they were submitted". B.F. Sturtevant Co. v. Industrial Comm'n, 186 Wis. 10, 19, 202 N.W. 324 (1925). The primary rule of state constitutional interpretation is that "the constitution is the expression of the people's will, adopted by them" and the intent to be determined is that of the people who ratified it. Albright, 64 Wash.2d at 770, 394 P.2d 231. See also State ex rel. Linn v. Superior Court, 20 Wash.2d 138, 143, 146 P.2d 543 (1944).

Thus, the court must determine the "common and ordinary meaning" of the term "religious instruction" to those who drafted and ratified the state constitution. Consideration of this issue arises under the third Gunwall criterion.

B. CONSTITUTIONAL AND COMMON LAW HISTORY

Courts must often resort to extrinsic sources in order to determine the meaning of constitutional terms. State v. Brunn, 22 Wash.2d 120, 139, 154 P.2d 826, 157 A.L.R. 1049 (1945). In State ex rel. Mason Cy. Logging Co. v. Wiley, 177 Wash. 65, 74, 31 P.2d 539 (1934), this court declared that " 'the public history of the [1130] times should be consulted, and should have weight' " in giving meaning to the terms used. A variety of sources are available to assist this court in determining the meaning and purpose of the "religious instruction" clause of Const. art. 1, sec. 11. Two very useful sources are the Enabling Act, through which the federal government authorized the citizens of the Washington Territory to call a constitutional convention and proceed to statehood, and the Journal of the State Constitutional Convention, 1889 (B. Rosenow ed. 1962). In addition, this court has used

contemporary newspapers' accounts of the state constitutional convention to supplement the official minutes since no verbatim record of the convention exists. Yelle v. Bishop, 55 Wash.2d 286, 293, 347 P.2d 1081 (1959).

Consideration of these various historical sources demonstrates that the sole purpose of the "religious instruction" clause of Const. art. 1, sec. 11 was to prevent public schools from giving sectarian religious instruction and to prevent the use of public funds to support private parochial schools.[1] See State ex rel. Dearle v. Frazier, 102 Wash. 369, 381, 173 P. 35 (1918); School Dist. 20 v. Bryan, 51 Wash. 498, 99 P. 28 (1909). See Utter & Larson, Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution, 15 Hastings Const. L.Q. 451 (1988). There is no evidence of any intent by those who drafted and ratified our state constitution to prohibit the use of public money for the purposes proposed by Mr. Witters. The state's denial of aid to Mr. Witters based on misperceived mandate of Const. art. 1, sec. 11 was improper.

The federal Enabling Act of 1889 which authorized the Washington Constitutional Convention contained a significant limitation in the area of religious freedom. The Enabling Act required that the state constitution include a provision for the "establishment and maintenance of systems of public schools, which shall be open to all the children ... and free from

---

[1]I have previously set forth the relevant history of Const. art. 1, sec. 11. See Witters v. Commission for the Blind, 102 Wash.2d at 643-49, 689 P.2d 53 (Utter, J., dissenting). I note that none of the conclusions from my earlier discussion are disputed by the majority in the present opinion.

sectarian control." Enabling Act, ch. 180, sec. 4, 25 Stat. 676 (approved Feb. 22, 1889), reprinted in Revised Code of Washington, vol. 0 (1987). This provision reflected a widespread concern about the contemporary practice of Bible reading and other sectarian religious instruction in the public primary and secondary schools. See D. Boles, The Bible, Religion, and the Public Schools 35 (1961); Utter & Larson, 15 Hastings Const.L.Q. at 458-67. Such practices were particularly offensive to the recent waves of Catholic and Jewish immigrants who objected to their children receiving compulsory instruction in the majority Protestant faith. See B. Parkany, "Religious Instruction" in the Washington Constitution (1965) (thesis available in the Washington State Library); D. Boles, supra.

The general consensus in Washington and the rest of the country was that public schools should not give sectarian religious instruction, and that private schools should not be supported by public funds. See B. Parkany, pt. 2, at 14; D. Boles, at 23-27, 33. This attitude was reflected in many state constitutions, including Washington's, that were written in the last half of the 19th century. D. Boles, at 33-34.

The Washington Constitutional Convention met in Olympia on July 4, 1889. That the Convention was concerned with forced religious instruction in public primary and secondary schools and public aid to parochial schools is supported by a number of circumstances surrounding the adoption of the "religious instruction" clause itself. On July 17, 1889, the Seattle Post-Intelligencer and the Tacoma Morning Globe both printed the Bill of Rights Committee's first draft of Const. art. 1, sec. 11. At that point, this provision contained no reference to "religious instruction." B. Parkany, pt. 1, at 6.

Two days later, on July 19, the Portland Oregonian, which was one of the most [1131] widely read newspapers in Washington Territory, ran an editorial concerning "religious instruction" in public schools. The editorial used the phrase "religious instruction" six times, and concluded with a strong stand:

> In order that liberty of conscience may remain inviolate ... there must be an absolute separation of church and state, religion and public schools ... [I]t is necessary to keep the public schools free from religious influences, from theological disputes and sectarian teachings....
> * * *
> ... Religious instruction in the public school means a gradual retrogression to the union of church and state, and this union means a tyrannical government and a corrupt priesthood.... [I]f liberty of conscience is valued at all, keep religion away from public schools.

The Oregonian, July 19, 1889, at 4, col. 2. On the same date, a Spokane newspaper also used the phrase "religious instruction" in an article summarizing the views of eminent clergymen on both sides of the debate. Spokane Falls [Daily] Review, July 19, 1889, at 3.

On July 25, a few days after the flurry of newspaper editorials, articles and letters to the editor on religious instruction in the public primary and secondary schools, the Bill of Rights Committee submitted its amended report to the Convention. The new draft, which was later adopted by the Republican- dominated Convention without debate, read in pertinent part as follows:

> Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual ... No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...

Journal of the Washington State Constitutional Convention, 1889, at 500 (B. Rosenow ed. 1962); B. Parkany, pt. 1, at 1.

The circumstantial evidence is strong that the phrase "religious instruction" that had been added by the Bill of Rights Committee was borrowed from the various newspaper articles published between the first and last drafts of its report. The frequent use of this phrase in the popular press and in the context of discussions relating to religious instruction in the public primary and secondary schools provides uncontradicted evidence as to the "common and ordinary meaning" of the phrase among those who drafted and ratified the constitution in 1889.

This court addressed the intent of the framers in drafting Const. art. 1, sec. 11 in State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918). Although the validity of much of that opinion was undermined in Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash.2d 912, 436 P.2d 189 (1967), cert. denied, 393 U.S. 960, 89 S.Ct. 389, 21 L.Ed.2d 372 (1968), no subsequent case has challenged the accuracy of the Dearle court's statement that

> it is a matter within the common knowledge of those who followed the discussion attending the framing of our [state] constitution that it was

> the purpose of the men of that time to avoid all of the evils of religious controversies, the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states.... The question then was -- and the people who adopted the constitution were so advised -- whether we should adopt a constitution which provided in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools.

(Italics mine.) Dearle, 102 Wash. at 381, 173 P. 35.

The early Attorney Generals' opinions also demonstrate that Const. art. 1, sec. 11 oriented toward prohibiting certain kinds of devotional sectarian instruction in public primary and secondary schools. See, e.g., AGO, Sept. 19, 1891 (Bible reading, prayers and devotional religious exercises in public schools prohibited by Const. art. 1, sec. 11); AGO, Dec. 20, 1909 (unconstitutional to open public school day with prayer); AGO, Mar. 24, 1916 (unconstitutional to give public high school credit for optional Bible study). [1132]

This evidence is considerable and leads to only one conclusion: the historic purpose of the "religious instruction" clause of Const. art. 1, sec. 11 was to prevent public aid to parochial schools and to prohibit religious instruction in public primary and secondary schools. Neither of these concerns is implicated here. Although historical analysis is not necessarily dispositive in a question of state constitutional interpretation, see State v. Reece, 110 Wash.2d 766, 779, 757 P.2d 947 (1988), the majority does not suggest that current values and conditions conflict with the historical intent of this provision.

C. PREEXISTING STATE LAW AND DIFFERENCES IN STRUCTURE

Neither of the fourth or fifth Gunwall criteria appear to be applicable in this case. I have uncovered no record of preexisting state law pertaining to the "religious instruction" phrase of Const. art. 1, sec. 11 that would enhance our understanding of its meaning and purpose. Differences in state and federal constitutional structure do not appear relevant in interpreting this provision.

D. PARTICULAR STATE OR LOCAL CONCERN

Gunwall also advises the court to examine whether the matter is of particular state or local interest. State v. Gunwall, 106 Wash.2d at 67, 720 P.2d 808. Neither the history of Const. art. 1, sec. 11 nor the vocational training program at issue in this case reflect any particular state interest. As discussed above, the language of Const. art. 1, sec. 11 reflected a national consensus in the late 19th century to restrict sectarian religious instruction in the public schools and to prohibit public funding of sectarian institutions. This is the context in which the phrased "religious instruction" was used by the local popular press of 1889.

Nor is there a particular state or local interest in the administration of the vocational training program for the blind. Eighty percent of the public funds used in this program derive from the federal government pursuant to an act of Congress. The state's interest is comparatively small.

Applying the Gunwall criteria to interpret Const. art. 1, sec. 11, I can only conclude that public funding

of religious instruction, as that term was commonly understood by those who ratified our state constitution, is not involved in this case. Therefore, there is no basis for reaching a result contrary to the one reached by the United States Supreme Court under the federal establishment clause.

V

I would hold that the granting of vocational rehabilitation assistance to Mr. Witters would not violate Const. art. 1, sec. 11. First, Mr. Witters is clearly entitled to receive at least that portion of vocational rehabilitation money representing federal funds. Second, the State has presented no evidence to support the majority's conclusion that all of Mr. Witters' vocational training involves "religious instruction". Third, the proper level of analysis is that of the funding program itself rather than the use of the funds by a qualified individual recipient. So long as the choice of which institution to attend for vocational training is that of the individual, the state's role in appropriating the funds is insufficient to come within the constraints of Const. art. 1, sec. 11.

DOLLIVER and DORE, JJ., concur.

DOLLIVER, Justice (dissenting).

By holding Larry Witters ineligible to receive funds to develop his employment skills merely because he made the personal choice to pursue a religious career, the court denies Witters his religious freedom as protected by the free exercise clause of the United States Constitution and diminishes his rights as a citizen.

In 1979 Larry Witters, who is legally blind, applied for vocational rehabilitation funds from the

Washington State Commission for the Blind (Commission). See RCW 74.18.030 and Laws of 1983, ch. 194, sec. 3, p. 1050. The public assistance code in former [1133] RCW 74.16.181 stated the purpose of such funding was to "assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." See RCW 74.18.130 and Laws of 1983, ch. 194, sec. 13, p. 1052.

Witters was found medically eligible for the Commission's funds and a hearing examiner held Witters' career goal of being a pastor, missionary, or youth director would, or could, lead to gainful employment which would meet the purpose of the program. The Commission, however, denied Witters the funds claiming the state constitution prohibited funding education of a religious nature.

On remand from the United States Supreme Court, which unanimously held there was no violation of the establishment clause of the First Amendment, the majority reaffirms the Commission and rules that even though Witters meets the purpose and the physical requirements of the program he is ineligible because the religious instruction needed for his career choice violates the Washington establishment clause, Const. art. 1, sec. 11. In reaching this result, the court is in direct conflict with the free exercise clause of the First Amendment.

I do not believe the state constitution ever meant to prohibit the individual choice of an adult in such a case as this (see dissent by Utter, J.). But even assuming the majority interpretation of the meaning of "religious instruction" is correct, it cannot supersede the free exercise clause. See Reynolds v. Sims, 377 U.S. 533, 584, 84 S.Ct. 1362, 1395, 12 L.Ed.2d 506 (1964).

Witters chooses to carry out his religious beliefs by studying theology and becoming a minister. He became eligible for aid because of a physical handicap and is still eligible for that reason. Witters does not ask for an exception to the general rule of eligibility. He only asks the general rule to be applied with equality, not for his choice of training to be disqualified because of its religious content.

While it is clear the majority believes there is no infringement of Witters' free exercise right, it neither offers any reasoning for such a conclusion based on the facts in this case, nor does it distinguish the federal cases which reach the exactly opposite conclusion.

Witters wants to become a minister, missionary, or youth leader to carry out his religious beliefs. The majority says Witters is not being denied benefits because of conduct arising from his religious beliefs. Majority, at 1127. The argument that being a minister is a "career or calling" and is not a religious act within the protection of the free exercise clause has already been rejected by the Supreme Court. As Justice Brennan wrote in his eloquent concurrence:

> The [Tennessee] court stated that "[i]t is not religious belief, but the career or calling [of ministry], by which one is identified as dedicated to the full time promotion of the religious objectives of a particular religious sect, that disqualifies." ...
>
> The characterization of the exclusion [of ministers or priests as delegates to a constitutional convention] as one burdening appellant's "career or calling" and not religious belief cannot withstand analysis. Clearly freedom of belief protected by the Free Exercise

> Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood. One's religious belief surely does not cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.

(Footnotes omitted.) McDaniel v. Paty, 435 U.S. 618, 630-31, 98 S.Ct. 1322, 1329-30, 55 L.Ed.2d 593 (1978) (Brennan, J., concurring).

Although it is true the training to become a minister is an act prompted by belief and as such does not have the absolute protection that pure belief does (Cantwell v. Connecticut, 310 U.S. 296, 303-04, 60 S.Ct. 900, 903-04, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940)), to say it does not fall within the protection of the free exercise clause is to deny the reality of the motivation which impels one to become a minister or missionary. Witters wishes to practice his religion by making it his full-time [1134] vocation. It defies common sense, not to mention the Constitution of the United States, to say such an act is not within the sphere of the free exercise clause.

The final step in the majority's analysis is its claim that, while denial of vocational funds may make Witters' goal financially difficult or impossible, this denial does not violate the free exercise clause. The court cites Justice Douglas who stated that individuals cannot demand a sum of money from government in order to better exercise their religious scruples. Sherbert v. Verner, 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring).

For understandable reasons the majority fails to continue the quote, since Justice Douglas goes on to say:

> Those considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church, but no more so than does the salary of any public employee. Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization--matters relevant to the Establishment Clause, not in issue here.

Sherbert, at 412-13, 83 S.Ct. at 1798-99.

Witters "otherwise qualifies". Payment should be made to him not as a ministry student, but as a visually handicapped student.

In another example of the importance of what it did not write rather than what was written, the majority totally ignores a line of cases which unmistakably hold an indirect burden on religion in the form of withholding benefits is an infringement on the right of free exercise. In Sherbert, for example, the Supreme Court stated "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." (Footnote omitted.) Sherbert v. Verner, at 404, 83 S.Ct. at 1794. This is not an isolated instance. As the Court said in a recent case:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate

> his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd., 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1431-32, 67 L.Ed.2d 624 (1981). Accord, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987).

Although acts protected by the free exercise clause are subject to regulation, the burden is on the government agency to prove a compelling state interest and to show its regulation is the least restrictive alternative. The State has offered no proof the complete denial of Witters' education was the least restrictive approach possible.

The only reason given for denying Witters his education is the need for greater separation of church and state than is provided under the First Amendment, which the majority believes can be found in the Washington Constitution. Majority, at 11. This is not enough. In a case originating in the state of Missouri, a student group wanted to use university facilities for religious activity. The Supreme Court found that once a public forum is created the First Amendment protection of free speech requires there be no discrimination based on the religious content of the speech. The Court ruled it was a compelling interest of the state to meet the requirements of th establishment clause, but that an equal access policy adequately met that requirement. Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

The importance of Widmar to the case before this court is that the Court did not find it a compelling reason that the State wanted greater separation of church and state under its state constitution than [1135] was required by the federal establishment

clause. In the words of the Supreme Court:

> Arguing that the State of Missouri has gone further than the Federal Constitution in proscribing indirect state support for religion, the University claims a compelling interest in complying with the applicable provisions of the Missouri Constitution.
> * * *
> ... [T]he state interest asserted here -- in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution -- is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.

(Footnotes omitted.) Widmar v. Vincent, at 275-76, 102 S.Ct. at 277-78.

Just as in Widmar, creating greater separation of church and state under our constitution than is required by the establishment clause of the federal constitution may be a rational reason, but it is not a compelling reason for the state when it comes in direct conflict with the free exercise clause of the First Amendment. Accord, McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978).

In an age of government benefits, balancing separation of church and state and freedom of religion is complex and cannot be done by placing our state establishment clause above the federal free exercise clause. Professor Tribe describes the

principles involved:

> Whenever both religion clauses are potentially relevant, as in McDaniel [v. Paty, supra], the dominance of the free exercise clause follows from the principles underlying both clauses. For both clauses embody a broad concept of the relationship between religion and the state, which must be modified to adapt to changing conceptions both of religion and of government. If individuals and groups are to enjoy meaningful religious freedom, the protection afforded by the free exercise clause must vary with the extent of governmental regulation and subsidy in society generally. The opinions of the Framers offer general guidance, expressed in such core values as voluntarism and separatism. In the context of these general values, we must consider whether a nation committed to religious pluralism must, in the age of the affirmative state, make active provision for maximum diversity; we must ask whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience. Whenever tension is perceived between free exercise and non-establishment, "... a value judgment [is required] as to which is to become dominant ... -- the one premised on a vital civil right, or the one premised on ... eighteenth century political theory. The resolution [is] preordained -- to pose the conflict is to resolve it." Even if one takes a more charitable view of the political theory underlying the opposed position, it seems doubtful that sacrificing religious freedom on the

> altar of anti- establishment would do justice to the hopes of the Framers -- or to a coherent vision of religious autonomy in the affirmative state.

(Footnote omitted.) L. Tribe, American Constitutional Law, sec. 14-8 at 1204 (2d ed. 1988).

There are two recent Supreme Court cases concerning free exercise where either a plurality or majority applied a lower test of "a reasonable means for a legitimate purpose" standard in justifying the government imposing a burden on a person's religious freedom as opposed to the compelling reason and least restrictive alternative test of the earlier cases. The facts of these cases, however, are entirely different from those in this case. The regulations were facially neutral with regard to religion, and the religious acts did not trigger the government measures. Bowen v. Roy, 476 U.S. 693, 703, 106 S.Ct. 2147, 2153, 90 L.Ed. [1136] 2d 735 (1986) (statutory requirement that social security number be furnished as condition of eligibility for benefits under food stamp and aid to families with dependent children programs does not violate free exercise clause, notwithstanding belief that use of number would impair child's spirit); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, ----, 108 S.Ct. 1319, 1325, 99 L.Ed.2d 534, 546 (1988) (free exercise clause does not prohibit government from permitting timber harvest in or road construction through portion of national forest traditionally used for religious purposes by three Indian tribes). See also, L. Tribe, supra at 1262-63.

In this case the statute as applied is not facially neutral. It has only one exclusion, as indicated in the

policy statement by the Commission, which is for those who use the funds "in pursuit of a career or degree in theology or related areas." Here a religious classification triggers the disqualification, and under these circumstances, even the recent cases would apply the strict scrutiny test of requiring a compelling state interest. See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. at 140, 107 S.Ct. at 1049, 94 L.Ed.2d at 198.

Witters has met his burden of showing an infringement on his right of free exercise. The State has not met its burden of showing a compelling reason why it should be able to infringe on that right. To require Witters to abandon his religious vocation in order to retain his funding as a handicapped person -- to require him to make such a choice--is to deprive him of the full benefits of citizenship. It is just such a diminishing of citizenship that the free exercise clause was meant to prevent. I dissent.

DURHAM, Justice (dissenting).

I agree with Justice Utter that article 1, section 11 of the Washington State Constitution -- the State's version of the federal establishment clause -- does not bar the Washington State Commission for the Blind (Commission) from paying vocational benefits to Larry Witters, even though he intends to use the funds to attend a Christian college with the ambition of becoming a pastor, missionary or church youth director. However, Justice Utter relies on a number of arguments to reach this conclusion, only one of which is necessary to resolve the issues in this case.

The United States Supreme Court has already held that the Commission would not violate the federal establishment clause by disbursing the funds to

Witters. Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, reh'g denied, 475 U.S. 1091, 106 S.Ct. 1485, 89 L.Ed.2d 737 (1986). The Court reasoned that the funds were neutrally available to all aid recipients and the decision to use the funds to benefit religion was made by the individual recipient, not the State.[1] Witters, at 487-89, 106 S.Ct. at 752-53. As Justice Utter points out in section IV of his dissent, consideration of the Gunwall criteria reveals that there is no reason to interpret the corollary state constitutional provision any differently on this particular point. Accordingly, the Commission would not violate Const. art. 1, sec. 11 by providing the funds to Witters.

Thus, I concur in section IV of Justice Utter's dissent. I also agree with much of the analysis in section II because it substantially mirrors the Supreme Court's analysis that is summarized above. I make [1137] no comment on sections I and III because there is no need to reach these issues.

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[1]The opinion also notes that "importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." Witters, at 488, 106 S.Ct. at 752. However, five Justices disagree with the importance of this fact. Justice Powell's concurrence, expressing the position of four other Justices, states that there would be no First Amendment violation in this case even if most of the funds distributed under the state program were eventually applied to religious education. See Witters, at 491 n. 3, 106 S.Ct. at 754 n. 3 (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.); see also Witters, at 490, 106 S.Ct. at 753 (White, J., concurring) (agreeing with "most" of Justice Powell's analysis of this point); Witters, at 493, 106 S.Ct. at 755 (O'Connor, J., concurring in part and concurring in the judgment) (finding this analysis "persuasive").

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No. 89-94

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1989

LARRY WITTERS,

Petitioner,

v.

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Article I, section 11 of the Washington State Constitution provides that "* * * no public money * * * shall be appropriated for or applied to any religious * * * instruction. * * *".

1. Does the Free Exercise Clause prohibit the State from applying this provision of its Constitution to a ministerial student who requests state funding for religious instruction as part of his ministerial studies?

2. Does the Equal Protection Clause contain a similar prohibition?

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petitioner Mischaracterizes the Issues Involved and the Decision Below.

In his phrasing of the questions presented, in his statement of the case, and in his argument, the petitioner consistently misstates what this case is all about. He would have the Court believe (1) that he has been denied any opportunity to participate in the State's vocational rehabilitation program for the blind and (2) that the reason for this denial is his vocational objective, *i.e.*, to become a pastor, missionary, or Christian youth director. Neither assertion is correct. The petitioner may still participate in the rehabilitation program;

indeed, as we shall show below, the possibility exists that he may still use that program to assist him in his vocational objective.

What the decision below precludes him from doing, however, is using that program to obtain funding for religious instruction. And this is because Article I, section 11 of the State Constitution provides that "* * * no public money * * * shall be appropriated for or applied to any religious * * * instruction * * *".

To put into sharper focus the scope and grounds of the decision below, and the misleading characterization of that decision by the petitioner, it may be useful to distinguish between three factors which may come into play in a case such as this. The first is the vocational objective. Is it religious, *e.g.*, to be a minister? Or is it secular, *e.g.*, to be an accountant? The second factor is the nature of the school involved. Is it a religious school, such as the Inland Empire School of the Bible which the petitioner wishes to attend? Or is it secular, as is, *e.g.*, the University of Washington? And the third factor is the specific nature and content of the instruction. Is it religious, such as a course in theology? Or is it secular, such as a course in accounting?

The fundamental reason why the petitioner was denied the financial aid he seeks was not the first factor, the vocational objective; nor was it the second, the nature of the school he wishes to attend.[1] Rather, it was the third, the religious nature of the instruction and training which he seeks. For it is that factor, and only that factor, to which the relevant portion of Article I, section 11 is addressed.

To illustrate this critical point, assume that a Mr. Jones had already completed all the courses in theology and bible studies necessary to become a minister, and that the only courses remaining for him to qualify for the ministry were English composition and public speaking — courses of obvious usefulness for writing and delivering sermons. We see no

[1] It is interesting to note during oral argument before the superior court, counsel for the petitioner attempted to have counsel for the State stipulate that sole reason for denying the requested financial aid was the petitioner's career goal. Counsel for the State, of course, declined, and the effort at record-stuffing thus failed. (See Verbatim Report of Proceedings, pp. 13-14.) As the petition for certiorari shows, however, counsel for the petitioner remains undeterred, and the effort continues.

constitutional obstacle, under the decision below, to the State funding those additional courses — at least so long as they are secular in content.

Conversely, assume that Mr. Jones and Mr. Brown both wish to take a course in theology or bible studies, with Jones wishing to become a minister and Brown, who has no religious commitment whatsoever, simply wishing to pursue a subject which he considers interesting. The goal or motivation makes no difference; Article I, section 11 of the State Constitution prohibits the funding of these courses for both Jones and Brown, no matter what their reasons for taking these courses.

Next, assume that Jones, again wishing to become a minister, wishes to take his courses in English composition and public speaking at a religiously affiliated institution such as Georgetown University or even the Inland Empire School of the Bible. Again, there is no constitutional difficulty under the decision below, so long as the courses are secular in content.

In short, the problem with what petitioner wants arises from the type of instruction which he wishes the State to fund, not from his career goal or from the institution he wishes to attend.

To be sure, the fact that the petitioner wishes to study to become a minister, at a school for bible studies, is not entirely irrelevant. But these first and second factors are relevant only as they bear on the third factor, *i.e.*, on the nature of instruction which the petitioner seeks. Their presence sends up a red flag, alerting one to the obvious probability — if not inevitability — that religious instruction will be involved. But that is the *only* relevance of the first two factors — important as that might be in particular cases.

Counsel for the petitioner, it should be emphasized, has admitted the obvious. As pointed out in the decision below, he stated at oral argument before the State Supreme Court: "We would concede that Larry Witters is getting a religious education." Pet. 6a. With that concession, any possible doubts about the applicability of Article I, section 11 were removed.

II. The Free Exercise and Equal Protection Claims are Without Merit.

With the scope and grounds of the decision below properly understood, the petitioner's Free Exercise and Equal Protection claims are simply untenable. To invalidate the application of Article I, section 11 in this case would be to preclude any uniform and consistent application of that constitutional provision, and to grant, in effect, an exclusion from the scope of that provision for those who, like the petitioner, wish to pursue religious studies in order to prepare for a religiously oriented career.

No decision of this Court applying either the Free Exercise clause or the Equal Protection clause requires such a result. More specifically, the petitioner's reliance upon *Widmar v. Vincent*, 454 U.S. 263 (1982) and *McDaniel v. Paty*, 435 U.S. 618 (1978) is completely misplaced.

In *Widmar*, a group of students were being denied the right of free speech on public university facilities because of the religious content of that speech, while all other groups — over 100 in all — were granted free access to those facilities. Here, however, the petitioner's right to free speech, including religious speech, is in no way involved.

In *McDaniel*, a minister was denied, under a state constitutional provision, the right to hold public office, simply because he was a minister. Here, in contrast the petitioner is being denied a right denied to everyone else, without exception, *viz.*, the right to state funded religious instruction.

Finally, a comment regarding *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981), upon which the petitioner also improperly relies.

This Court has found governmental coercion sufficient to trigger the protection of the Free Exercise Clause in situations where the government forces individuals to choose between the relinquishment of a governmental benefit and the compromise of religious belief. In *Sherbert*, for example, a Seventh Day Adventist had been discharged for her refusal to work on Saturday, which was her Sabbath, and was denied unemployment benefits on the ground that her refusal to work on Saturday was not a permissible reason for declining to accept work. The Court noted that "no criminal sanctions

directly compel [Sherbert] to work a six-day week," but observed that her "declared ineligibility for benefits derives solely from the practice of her religion" and that "the pressure upon her to forego that practice is unmistakable." 374 U.S. at 403, 404.

The Court stated that the denial of Sherbert's claim for unemployment benefits had the effect of forcing her to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. It concluded that "[g]overnmental imposition of such a choice puts *the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship*" (*ibid.*, emphasis added). *Sherbert* and its progeny thus stand for the proposition that the Free Exercise Clause's protection for religiously grounded conduct is called into play when the government subjects an individual to the choice of obtaining a benefit or complying with the dictates of faith, "* * * thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-718.

In *Thomas*, a Jehovah's Witness was likewise denied unemployment benefits because he refused to accept a transfer from his employer to a job which involved working on military weapons — making turrets for military tanks. Following *Sherbert*, the Court reinstated the benefits.

One cannot, of course, adhere to the beliefs of the Seventh Day Adventists while working on a Saturday; nor can one adhere to the beliefs of the Jehovah's Witnesses while making military weapons.

The petitioner, in contrast, is not prevented from adhering to any of his religious beliefs. As stated by the Court in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. ___, 99 L. Ed. 2d 534 (1988):

> The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the govern-

ment." *Sherbert, supra,* at 412, (Douglas, J., concurring). 99 L.Ed. 2d at 547-548.

Lyng placed the proper limits on the scope of *Sherbert* and *Thomas* — limits which are applicable here as well.

III. The Supremacy Clause Question is not Properly Presented.

We here must confront a problem which has plagued this case from its inception ten years ago. We refer to the sparcity of the record, and more specifically to the absence of any evidence as to how the vocational rehabilitation program actually operates.

The reason for this sparcity is that from the inception of this case the State's focus was on state constitutional provisions, with primary reliance on Article I, section 11, while the petitioner's principal focus was on the Free Exercise Clause. At no stage in the administrative proceedings at the agency level, where the record was actually made, did the petitioner claim that Article I, section 11 was inapplicable because he was not really seeking religious instruction or because state moneys would not be used to pay for it. For these reasons, there was no need to inquire closely into the operation of the program, the exact nature of the courses petitioner wished to take, or the nature of the funding sources. Indeed, after the initial decision denying the requested financial aid, the decision went through three separate levels of administrative review. At each level, Article I, section 11 provided the basis for affirming the initial decision; and at none of these levels did the petitioner make the claim he now asserts, *i.e.,* that the use of federal matching funds in financing the program somehow precludes the application of Article I, section 11. Nor did he present any evidence about the operation of the program which might support such a claim.

That claim is really an afterthought, and seems to stem from the dissenting opinion of Justice Utter in the second State Supreme Court decision. See Pet. 14a-15a. It should be too late to make it now, especially in view of the sparcity of the record.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-94

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LARRY WITTERS,
Petitioner,
v.

WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent

On Writ of Certiorari to The Supreme Court of Washington

BRIEF AMICUS CURIAE OF THE COMMITTEE FOR EQUAL RIGHTS IN EDUCATION IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the denial of state and federal funds for the vocational training of a handicapped person solely on the basis of that person's protected religious choice to pursue a vocation as a pastor, missionary, or youth director clearly departs from this Court's teaching about free exercise of religion.

II. Whether the state's exclusion of a person from a governmental entitlement solely on the basis of that person's protected religious choice to pursue a vocation as a pastor, missionary, or youth director violates the equal protection clause of the fourteenth amendment.

III. Whether an apparent conflict exists among state courts of last resort on the relationship between parallel provisions of the state and federal constitutions dealing with religious freedom and equality.

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STATEMENT OF INTEREST

The Committee for Equal Rights in Education (CERIE) consists of attorneys and other individuals interested in legal action to secure equal opportunity in educational choice for all families to choose public or private education, regardless of race, income or religion. It gives highest priority to achieving equality in educational choice for those families who suffer most from legal or economic barriers in their ability to afford to pick the "right" public school attendance area or to choose private schools.

CERIE has a direct interest in this litigation because a number of states have decided to forego programs designed to promote equal opportunity for educational choice, in part because of the mistaken notion that a textual commitment in a state constitution to stricter separation of church and state than is required under the federal establishment clause obviates further analysis of the federal constitutional provisions dealing with religious freedom and equality.

The parties to this case, moreover, are primarily concerned with the resolution of the case under the Washington constitution and the relevant provisions of the federal provisions. In this amicus brief CERIE has collected the provisions of the constitutions of the several states that resemble Art. I, § 11 of the Washington Constitution. These provisions support the conclusion that in its current posture this case again merits review by this Court because of nation-wide scope of the potential conflict between parallel provisions of the federal and state constitutions dealing with religious freedom and equality.

Under Rule 36.1 of this Court, the amicus has obtained the consent of counsel for the parties to file this brief. The consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This Court is already familiar with the parties to this litigation, which is now over ten years old. The petitioner is a legally blind adult who seeks to participate in a program of assistance in vocational rehabilitation that is funded by the federal government and by the State of Washington. The particular form of vocational training that the petitioner desires is educational training for the lawful occupation of some form of church ministry as pastor, missionary, or youth director.

The respondent, Washington Department of Services for the Blind, has not declared Mr. Witters ineligible for participation in this entitlement program. On the view, however, that it may not expend state funds for "religious instruction," respondent has declined to provide public funds for the particular program of studies that the petitioner wishes to undertake.

In its first review of this case, the Washington Supreme Court sustained the administrative decision of the respondent on the ground that "the provision of state aid to a person studying to be a pastor, missionary, or church youth director violates the establishment clause of the first amendment to the United States Constitution." *Witters v. Commission for the Blind*, 102 Wash.2d 624, 626, 689 P.2d 53 (1984) [*Witters I*]. This Court unanimously rejected that conclusion, and remanded the case for further proceedings. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, *reh'g denied*, 475 U.S. 1091 (1986).

On remand, the Washington Supreme Court again sustained the respondent's denial of welfare benefits to the petitioner. *Witters v. Washington Dep't of Sers. for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 (1989) [*Witters II*]. Primary attention was focused on the correctness of the respondent's decision under the state constitution, the interpretation of which split the lower court 5-4.

Three problem are presented in this case. First, the Washington Supreme Court has adopted a view of its state constitution that conflicts with relevant precedents

of this Court construing the free exercise clause of the federal constitution (Part I, *infra*). Second, its construction of its state constitution departs from the teaching of this Court on the equal protection clause (Part II, *infra*). Third, the lower court's interpretation of the relationship between the parallel provisions of the federal and state constitutions is in apparent conflict with the approach taken by many other state courts of last resort. (Part III, *infra*).

Amicus urges this Court to grant review of this case because the lower court did not attend sufficiently to the precedents of this Court relating to the protection of free exercise of religion under the first amendment to the federal constitution, or to this Court's precedents relating to equal protection secured under the fourteenth amendment to the federal constitution. Another reason for granting the writ is that this case in its current posture affords this Court an opportunity to clarify for the state courts the relationship between state constitutional provisions and the mandates of the federal constitution.

ARGUMENT

I. This Court Should Grant the Writ because the Decision below clearly Departs from this Court's teaching on the Free Exercise of Religion.

In our system of federalism, it is clear that state courts are the final arbiters of the meaning of state law, including the state constitutions.[1] For this very reason

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1 In *Witters I*, 102 Wash. 2d 624, 643-649, 689 P. 2d 53 (1984) (Utter, J., dissenting), and in a scholarly article, Utter & Larson, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution," 15 Hastings Con. L. Q. 451 (1988), Justice Utter set forth the relevant history of Art. 1, § 11 of the state constitution. Without disputing any of these conclusions about the provision on which it rested its decision, and without offering any reason why this provision should be interpreted differently from the federal constitution under the criteria established by the Washington

this Court expressly acknowledged that the Washington Supreme Court was free to review this case on remand under its own state constitution. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 489 (1986).

Eminent jurists have recently given new impetus to the movement stressing the importance of state constitutional law an as independent source of the protection of human rights.[2] This emphasis is fully harmonious with this Court's teaching that when a state court has clearly based its decision on an adequate, independent state ground, this Court lacks jurisdiction to review that decision. See, e.g., *Michigan v. Long*, 463 U.S. 1031 (1983); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Where, however, a federal question is presented by virtue of an apparent conflict between the interpretation of state law and the requirements of the federal constitution, this Court manifestly has jurisdiction to review that decision, at least to determine whether a genuine conflict between a federal interest and a state interest exists. That is the situation here.

In one footnote in *Witters II*, App. 10a, n. 18, the Washington Supreme Court includes a string cite to this Court's precedents on free exercise. The reader is told to "see" these cases, the relevance of which to this case is never discussed. The real message that *Witters II* commu-

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Supreme Court in *State v. Gunwall*, 106 Wash. 2d 54, 720 P. 2d 808 (1986), the majority concluded that the respondent's denial of state aid to the petitioner was required under Art. 1, § 11. App. 5a-8a. Although Justice Utter has arguably given a better account of the meaning of this provision, the interpretation of state law is not before this Court. The federal question presented here is whether, assuming the majority's reading of the state constitution is correct, that interpretation conflicts with the mandates of the free exercise clause of the first amendment and the equal protection clause of the fourteenth amendment, and must therefore be set aside under the supremacy clause.

2 See, e.g., Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977); Linde, "First Things First: Rediscovering the States' Bills of Rights," 9 U. Baltimore L. Rev. 379 (1980).

nicates is that once the meaning of a state constitutional provision has been determined, further scrutiny of this Court's precedents is not really necessary.

If the lower court had taken these precedents more seriously, three glaring errors could have been avoided. As things stand, this Court should grant the writ because the lower court's treatment of the safeguard of the free exercise clause is so perfunctory that it constitutes a significant departure from this court's precedents on three major issues. First, the lower court erred by giving minimal rather than broad scope to the protection afforded to religious activity under the free exercise clause. Second, the lower court erred by authorizing the denial of welfare benefits to persons in a manner that burdens the free exercise of religious choice without a showing of a compelling state interest. Third, the lower court authorized the denial of the benefit to the petitioner on a record totally devoid of any showing by the respondent that it lacked less restrictive alternatives to effectuate the government's interest.

A. The Denial of a Governmental Entitlement Constitutes a Burden on the Free Exercise of Religion.

The lower court concluded that its interpretation of the state constitutional provision banning the expenditure of state funds for religious instruction constitutes no difficulty under the federal free exercise clause. *Witters II*, App. 9a-11a. The lower court notes that the current standard for free exercise analysis requires the religious claimant to make a showing of "the coercive effect of the enactment as it operates against him in the practice of his religion." App. 9a, citing *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963). Without any support in this Court's precedents, and citing only the opinion in *Witters I* that this Court reversed, the lower court ruled that no burden is imposed on the petitioner's religious freedom unless the government compels or pressures an individual "to violate a tenet of his religious belief." App. 9a.

In a series of cases dealing with the denial of unem-

ployment benefits to sabbatarian workers, this Court has repeatedly clarified that governmental "compulsion" or "coercion" of a religious claimant is present not only when the government acts directly to impose criminal sanctions on protected religious activity, but also when the government subtly pressures the religious claimant to choose between his or her religious commitments and the denial of a welfare benefit to which the claimant is otherwise entitled. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963); and see *Frazee v. Illinois Dep't of Employment Security*, 109 S. Ct. 1514 (1989); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981).

The lower court cites from the concurring opinion of Justice Douglas in *Sherbert*, an opinion joined by no other Justice. App. 11a. Indeed, the lower court totally ignores the significance of Justice Brennan's opinion for the Court in *Sherbert* on the very matter under discussion, namely the burden on the petitioner's religious freedom caused by the respondent's denial of a governmental entitlement solely on the basis of the petitioner's religious convictions. The Court refers to *Sherbert, Hobbie* and *Thomas* in a single footnote as cases "dissimilar" to this case without offering a word of explanation as to why they should not control.

The lower court has now ruled twice that the petitioner's eligibility to participate in a vocational rehabilitation program funded by the federal and state governments may be conditioned on an assurance that no part of the federal or state funds are expended for "religious instruction."[3] It is, of course, plain that petitioner's

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3 The sweeping scope of the lower court's view systematically ignores the distinction repeatedly drawn by this Court in cases involving financial assistance to institutions of higher education or to students attending them. See, e.g., *Tilton v. Richardson*, 403 U.S. 672 (1971); *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), summarily

choice of a ministerial vocation is at the core of protected religious activity. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 630-631 (1978) (Brennan, J., concurring). It is only by ignoring the clear teaching of this Court in *Sherbert* and its progeny that the lower court could reach the remarkable conclusion that conditioning the availability of an entitlement in a manner that virtually excludes the petitioner's vocational choice does not effectively penalize or burden the free exercise of religion. In reaching this conclusion, the lower court needlessly truncated the protection afforded under the free exercise clause of the federal constitution. For that reason alone, the writ should issue.

B. The State made no credible showing on this record that its interest in denying funding of the petitioner's vocational choice was truly compelling.

Having missed the significance of *Sherbert* on the issue of whether the denial of a governmental entitlement constitutes a burden on the free exercise of religion, the lower court also departed from this Court's teaching that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice" to justify the infringement of free exercise. "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert*, 374 U.S. at 406, citing *Thomas v. Collins*, 323 U.S. 516 (1945). As in *Sherbert*, "[n]o such abuse or danger has been advanced in the present case." *Sherbert*, *id.*

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aff'd, 434 U.S. 803 (1977); *Smith v. Bd. of Governors of Univ. of North Carolina*, 429 F. Supp. 871 (W.D. N.C.), summarily aff'd, 434 U.S. 803 (1977). If given general effect, the ruling of the lower court would have a dramatic impact on numerous programs of federal financial assistance, such as the College Work Study program, 20 U.S.C. 1088, 2330 et seq., by nullifying congressional guidelines for eligibility through the invocation of a state constitutional provision without any discussion of countervailing federal precedents.

In its pithy discussion of the equal protection claim, the lower court asserted: "The state has a compelling interest in maintaining the strict separation of church and state set forth in [Wash.] Const. art 1, sec. 11." App. 11a. Even if one were to agree that the majority's conclusion on the interpretation of state law is correct, a matter not before this court, see note 1 *supra*, the rationale offered by the lower court completely overlooks this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) on that very issue. In *Widmar*, the General Counsel for the University of Missouri advanced the same claim urged by the Attorney General in this case, namely that a state's desire for greater separation of church and state under its state constitution than is required under the federal no-establishment clause constitutes a "compelling state interest" for purpose of overriding competing interests in religious freedom and freedom of speech protected under the first amendment of the federal constitution. This Court resoundingly repudiated that position in *Widmar*. 454 U.S. at 275-276. See also *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a provision of the Tennessee state constitution that conflicted with federal guarantees of free exercise of religion and equal protection of the laws).

The lower court refers to *Widmar* and *McDaniel* in one footnote, App. 10a, note 18, but does not discuss the relevance of these decisions to this case. Perfunctory mention of a controlling precedent that is then completely ignored surely falls within the scope of clear departure from this Court's precedents that supports the granting of certiorari.

C. The State made no credible showing on this record that it could not effectuate its legitimate interests in a manner less restrictive of petitioner's religious freedom.

In *Sherbert* this Court suggested that it is incumbent on the government "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment right." 374 U.S. at 407. In sub-

sequent free exercise cases this Court has clarified that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). See also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.")

In its current posture, this case is totally devoid of any evidence to support the view that the state's denial of the petitioner's request for financial assistance was the least restrictive alternative available to the state. For example, even if federal guidelines relating to the use of the funds appropriated for vocational rehabilitation did not expressly mandate inclusion of training programs such as that sought by the petitioner, the state is surely free to operate this program on a neutral basis by providing a voucher system that would maximize freedom of individual choice without implicating the government in endorsement or sponsorship of any particular religious belief. That is how the G.I. Bill has functioned for veterans for decades without any challenge to its constitutional validity.

The lower court made no reference whatever to the requirement that the government may prevail against a free exercise claim only on a showing that it could not effectuate its legitimate interests in a manner less restrictive of petitioner's religious freedom. For this reason alone, the writ should issue to correct this significant departure from this Court's free exercise jurisprudence.

II. This Court Should Grant the Writ because the Decision below Clearly Departs from this Court's Teaching that the State's Exclusion of a Person from a Governmental Entitlement solely on the Basis of that Person's Religious Choice Violates the Equal Protection Clause of the Fourteenth Amendment.

The lower court's treatment of the equal protection claim is not just lean or spare. It completely overlooks the independent constitutional violation that occurs when the government is allowed to classify invidiously along religious lines. The end result of avoiding discrimination on the basis of religion may be achieved either by means of the religion clause of the first amendment, in either of it components. The nonestablishment principle clearly forbids preferential treatment of one religious group over another. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring); *Larson v. Valente*, 456 U.S. 228 (1982); Everson v. Board of Education, 330 U.S. 1, 15 (1947); see also Paulsen, "Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication," 63 Notre Dame L. Rev. 311 (1986).

The free exercise principle likewise protects against invidious discrimination both by granting to all religious organizations an appropriate sphere of autonomy, see, e.g., *Corp. of Presiding Bishop v. Amos*, 487 U.S. 237 (1987); *Watson v. Jones*, 13 Wall. 679 (1872); and see Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981), and by placing significant limits on governmental inquiry into the truth of any religious claim. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944).

This Court, moreover, has repeatedly taught that discrimination on the basis of religion is likewise forbidden under the equal protection clause. See, e.g., *Widmar v. Vincent*, 450 U.S. 909 (1981); *Niemotko v. State of Maryland*, 340 U.S. 268 (1951); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938); *Strauder v.*

State of West Virginia, 100 U.S. 303 (1879). The lower court's ignoring of these precedents and its casual, even conclusory, treatment of the equal protection claim merits review by this Court.

III. This Court Should Grant the Writ to Resolve the Apparent Conflict among State Courts of Last Resort on How to Reconcile Parallel Provisions of the Federal and State Constitutions dealing with Free Exercise of Religion and Equal Protection.

There is, of course, considerable room for diversity of approaches to the interpretation of state constitutions that are permissible and even laudable in our federal system. As a general matter, the mandate of the supremacy clause is met as long as the interpretation of parallel provisions in the federal and state constitutions present no genuine conflict, or as long as the state constitution affords more rather than less protection. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

This case illustrates the potential for conflict between federal and state constitutional provisions that arises when, contrary to the teaching of this Court, lower courts give greater value to the nonestablishment principle than to the free exercise principle. See L. Tribe, *American Constitutional Law* 1201-1204 (2d ed. 1988). The apparent conflict among state courts of last resort on this matter constitutes an independent ground for review of this case.

State courts are divided on the extent to which the free exercise clause or the equal protection clause of the federal constitution may require them to limit or even to invalidate provisions in state constitutions that are more stringent than the federal establishment clause.

Facing constitutional provisions similar to those challenged in this case, the Michigan Supreme Court invalidated a portion of its own constitution under the federal free exercise clause. *School District v. Kelly*, 384 Mich. 390, 408, 185 N.W.2d 9, 19 (1971). As the Michigan high court construed its state constitution, it

would require the court to invalidate services to private school children when provided on public school premises.[4] The Michigan court ruled that this denied those children the same benefit available to all others and therefore violated the free exercise clause. This is also the view of dissenting Justice Dolliver in *Witters II*, who would find that the Washington state constitution "cannot supersede the free exercise clause." *Witters*, 112 Wash. 2d 363, App. 34a.

Courts in other states have also decided that the federal standard must prevail, despite more specific and facially more stringent state constitutional provisions. These courts have interpreted their state constitutions to require the general principles embodied in the federal constitution, avoiding conflict between state provisions and the free exercise and establishment clause. E.g., *Conrad v. City and County of Denver*, 656 P.2d 662, 670 (Colo. 1982), after remand, 724 P.2d 1309 (Colo. 1986) (en banc); *Bowerman v. O'Connor*, 104 R.I. 519, 247 A.2d 82 (1968).

Other courts have applied standards in interpreting the state constitution that differ from those prescribed for the federal constitution, but have reached the same result that would obtain under the federal constitution.[5] This

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4 Nothing in *Grand Rapids School District v. Ball*, 105 S.Ct. 3216 (1985), teaches to the contrary, for that case involved the provision of services on private school premises.

5 See, e.g., *Commonwealth v. School Committee*, 382 Mass. 665, 417 N.E.2d 408 (1981) (special education services do not violate state constitution, applying state standards under state constitution); *Gaffney v. State Department of Education*, 192 Neb. 358, 362, 220 N.W.2d 550, 553 (1974) (transportation upheld, noting state constitution requires different rules but nonetheless considering Supreme Court precedent under the first amendment); *Board of Education v. Bakalis*, 54 Ill. 2d 448, 461, 464--65, 299 N.E.2d 737, 743, 745 (1973) (transportation of private school students held not to violate state constitution, on grounds that it was an historical practice); *Hughes v. Board of Education*, 154 W. Va. 107, 174 S.E.2d 711 (1970) (upholding transportation services under state and federal constitutions), app. dis-

Court has expressly approved a state constitutional provision that would afford neither more nor less protection than that afforded under the federal equal protection clause. *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982).

Another group of state courts of last resort have agreed with the Supreme Court of Washington and have held that state constitutional provisions restricting the use of public funds may be decided on state constitutional grounds alone, without regard to potential tension with the free exercise clause or other provisions in the federal Constitution. These include cases where the tension between the state provision and the federal free exercise clause was similar to that posed by the constitution of Washington. E.g., *Fannin v. Williams*, 655 S.W.2d 480, 483 (Ky. 1983) (textbook loans to students in private schools violates state constitution); *California Teachers' Ass'n v. Riles*, 29 Cal. 3rd 794, 812, 176 Cal. Rptr. 300, 632 P.2d 953, 964 (1981) (same); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *McDonald v. School Board*, 90 S.D. 599, 246 N.W.2d 93, 96 (1976) (same).

Almost all the states have provisions in their constitutions that are more detailed and usually more stringent than the establishment clause of the federal constitution.[6] Any of these provisions may pose a conflict

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missed, 403 U.S. 944 (1971); *Opinion of the Justices*, 109 N.H. 578, 258 A.2d 343 (1969) (upholding textbook loans and materials).

6 Ala. Const. art. I, § 3; Alaska Const. art. VII, § 1; Ariz. Const. art. II, § 12; Ark. Const. art. I, § 2; Cal. Const. art. IX, § 8; Colo. Const. art. II, § 4, & art. IX, § 7; Conn. Const. art. 7; Del. Const. art. I, § 1; Fla. Const. art. I, § 3 (1968); Hawaii Const. art. X, § 1; Idaho Const. art. IX, § 5; Ill. Const. art. 10, § 3; Ind. Const. art. 1, § 6; Iowa Const. art. 1, § 3; Kan. Bill of Rights, § 7; Ky. Const. § 189; Md. Const., Declaration of Rights, art. 36; Mass. Const., Articles of Amendment, art. XLVI, § 3, & art. CIII; Mich. Const. art. VIII, § 2, par. 2; Minn. Const. art. I, § 16, & art. XIII, § 2; Miss. Const. art. 8, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 7; Neb. Const. art. I, § 4; Nev. Const. art. 11, § 10; N.H. Const. art. 6; N.J. Const. art. 1, § 3; N.M. Const. art. IV, § 31, & art. IX, § 14; N.Y. Const. art. 7, § 8(1), & art. 11, § 3; N.D.

between the state constitutional provision and the free exercise or the equal protection clauses in the federal constitution. If the Court grants the writ in this case, its decision could have a broad impact in every state with a state constitutional provision that could be construed to require the state to deny generally available benefits to an individual because of that individual's religious commitments. Granting the writ in this case would thus afford the Court an opportunity to clarify for the state courts the appropriate relationship between the federal constitutional guarantees of religious liberty and equal protection and parallel provisions in state constitutions.

Const. art. VIII, § 5; Ohio Const. art. VI § 2; Okla Const. art. II, § 5; Or. Bill of Rights, art. 1, § 5; Penn. Const. art. I, § 3, & art. 3, § 15; R.I. Const. art. 1, § 3; S.C. Const. art. XI, § 4; S.D. Const. art. VI, § 3; Tenn. Const. art. 1, § 3; Tex. Const. art. 1, § 7; Utah Const. art. 1, § 4, & art. X, § 9; Vt. Const. Ch. 1, art. 3; Va. Const. art. VIII, § 10; Wash. Const. art. 1, § 11; W.Va. Const. art. 3, § 15; Wis. Const. art. 1, § 18; Wyo. Const. art. 3, § 36.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari.

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